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PRIVATE ACTION FOR OBSTRUCTION TO PUBLIC RIGHT OF PASSAGE.

When is there a civil action, at common law, by a private person, for damage caused to him by the tortious obstruction of a public right of passage over a public way?[1]

At the outset, it seems expedient to give some explanation as to the scope of the discussion; and also as to the reason for frequently citing a line of authorities not directly in point.

The expression "a public way" is intended to include both land ways and water ways.[2]

The expression "tortious obstruction" is intended to include only cases where the obstruction is admitted or assumed to be unlawful. It is not intended to include: (1) cases where the question in dispute is whether the obstruction is or is not unlawful, *e. g.*, a dispute as to the constitutionality of a legislative act purporting to authorize the obstruction; nor (2) cases where the obstruction is admitted to be lawful. And yet, in discussing the main question as above framed, reference will repeatedly be made to decisions in cases falling under the two last mentioned classes; and the opinions in these latter cases will often deserve careful consideration in answering the main question.

This seeming anomaly is capable of explanation.

Many State Constitutions have been amended so as to prohibit, not only "taking", but also "damaging" or "injuring" property, unless compensation is provided for. Hence, to determine whether an act purporting to authorize the discontinuance of,

[1] The word "nuisance" is seldom used in this article, except in quotations.

[2] "The river is a highway, and as regards obstructions there appears to be no distinction between it and a highway on land." Moss, J. A., Drake *v.* Sault St. Marie, etc., Co. (1898) 25 Ont. App. 251, 258.

As to "public rights of way":

"They are of two kinds, for they exist either over highways or over navigable rivers. The law as to these two is essentially the same, and although we shall here speak specifically of highways only it will be understood that *mutatis mutandis* the same principles are for the most part applicable to navigable rivers also." Salmond, Torts (1st ed.) 268.

or substantial change in, a highway is constitutional, it is often necessary to decide whether property is "damaged". Again, many States have enacted statutes giving a remedy to persons who suffer "damage" from discontinuance of, or substantial change in, a highway, when such change is made under the authority of the State. And there is an important English statute giving a remedy to persons whose lands, or whose interests in lands, are "injuriously affected" by certain classes of authorized public works. In determining whether an abutter has been "damaged" within the meaning of the above described constitutional amendments or remedial statutes, it is common (whether strictly accurate or not) for courts to apply the test, whether the plaintiff could have maintained a common law suit if the defendant's acts had been done without lawful authority from the State.[3] Hence, decisions under such constitutional amendments or such remedial statutes (particularly the latter) are frequently cited in common law actions; and the same is true as to decisions in common law actions being cited in suits under such statutes. Thus *Smith* v. *Boston,*[4] was an action to recover damages under a remedial statute; but the opinion of the court in favor of the defendant in that case has exerted great influence as to the decision of common law actions.

Returning, after these explanations, to the main question:

It is now generally admitted that no private action can be maintained at common law, unless the plaintiff has sustained actual damage; meaning damage which involves appreciable pecuniary loss to him individually. The controversy is whether this goes far enough; or whether the law ought to further insist upon certain particular kinds of actual damage (upon certain exceptional classes of actual damage). Those who advocate the more stringent rule contend that, in the absence of these requirements, there is great danger of such a multiplicity of suits as would constitute an intolerable evil. The apprehension of such a result has exerted much influence upon courts; sometimes inducing a denial of recovery to a plaintiff who has suffered very substantial damage, but whose damage does not fall within certain exceptional classes.

Just what dangers are apprehended; and how far are the apprehensions well founded?

Some early views are brought out in the following often quoted passages from Coke's Reports and Coke upon Littleton:

[3] 1 Lewis, Eminent Domain (3rd ed.) § 199.

[4] (Mass. 1851) 7 Cush. 254.

"A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance, and then it is not reasonable that a particular person should have the action; for by the same reason that one person might have an action for it, by the same reason every one might have an action, and then he [*i. e.* the defendant] would be punished 100 times for one and the same cause. But if any particular person afterwards by the nuisance done has more particular damage than any other, there for that particular injury, he shall have a particular action on the case; and for common nuisances, which are equal to all the King's liege people, the common law has appointed other courts for the correction and reforming of them."[5]

"For if the way be a common way, if any man be disturbed to goe that way, or if a ditch be made overthwart the way so as he cannot goe, yet shal he not have an action upon his case; and this the law provided for avoyding of multiplicity of suits, for if any one man might have an action, all men might have the like. But the law for this common nuisance hath provided an apt remedy, and that is by presentment in the leete or in the torne, unlesse any man hath a particular damage; as if he and his horse fall into the ditch, whereby he received hurt and losse, there for this special damage, which is not common to others, he shall have an action upon his case; and all this was resolved by the court in the King's bench."[6]

Two principal dangers seem to be apprehended from a recognition of the doctrine that any actually damaged person can sue.

Danger No. 1. That suits can be brought by each and every member of the entire community, even though the damage, in the case of most plaintiffs, would be purely theoretical.[7]

Danger No. 2. That suits, even if maintainable only by persons suffering actual damage, will be brought in an infinite number of cases by persons whose damage is extremely small in amount.

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[5] *Dicta* in Williams' Case (1592) 5 Coke *73a.

[6] Co. Litt. *56a; *cf.* 3 Bl. Comm. 219, and 4 Bl. 167.
"The meaning of Lord Coke, Blackstone, and other writers is, that while a common nuisance exists merely as a danger, there no individual can have an action, as all are in the same situation; but the instant a man is obliged to take even a circuitous route, the damage is peculiar to himself, because it is impossible that he sustains it in common with anyone." Argument of Mr. Dallas, in Hughes *v.* Heiser (Pa. 1808) 1 Bin. 463, 466.

[7] It seems to have been feared that any man, whether he had occasion to use the highway for any beneficial purpose to himself or not, might bring his suit. See 2 Wood, Nuisances (3rd ed.) § 683.

As to Danger No. 1.

This danger is purely imaginary. Any lawyer who thinks otherwise overlooks the distinction, between the requisites to a public prosecution of an obstruction as a crime, and the requisites to a private action of tort by an individual against the obstructor. To sustain a ciminal prosecution by the State, it is not necessary to prove that actual damage has been sustained by anybody; "it being sufficient that the obstruction is calculated to injure all who may chance to travel the way."[8] "An indictment would, of course, lie, although no person had ever wanted or tried to use the way since the [creation of the] obstruction, the *possibility* of inconvenience is sufficient."[9]

As a matter of legal theory, the law may be said to regard every member of the community as suffering damage whenever a public right is obstructed. But this theoretical damage, incurred in contemplation of law by the entire community, is not equivalent to actual damage involving pecuniary loss to an individual.[10] "If", said Chancellor Walworth, "he sustains no damage but that which the law presumes every citizen to sustain, because it is a common nuisance, no action will lie."[11]

A plaintiff cannot seek an apportionment of damage which he has only theoretically sustained in common with all other members of the public. He can sue only to recover for actual damage which he has individually sustained. ". . . one who suffers actual pecuniary loss or damage, to that extent suffers beyond his portion of injury in common with the public at large, and may have his private action."[12] If certain individual members of the public have suffered actual damage, a plaintiff, who is not one of the sufferers, cannot appoint himself their trustee to sue on their behalf. And if a plaintiff is one of several individuals

[8]1 Bishop, New Crim. Law, § 244, par. 3. State *v.* Narrows Island Club (1888) 100 N. C. 477, is directly in point.

[9]Judge E. H. Bennett, 19 Am. L. Reg. [N. S.] 624, 625. And see Bigelow, C. J., in Wesson *v.* Washburn Iron Co. (Mass. 1866) 13 Allen 95, 102.

[10]See Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 363.

[11]Lansing *v.* Smith (N. Y. 1829) 4 Wend. 9, 25. "Those who have no occasion of business or pleasure to pass over a road thus obstructed, and who have not attempted it, cannot maintain an action for the obstruction thereon." Appleton, J., Brown *v.* Watson (1859) 47 Me. 161, 162.

[12]Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 365.

who have each severally suffered damage, he cannot recover for the damage suffered by the others.[13]

As to Danger No. 2.—That suits, even if maintainable only by persons suffering actual damage, will be brought in an infinite number of cases by persons whose damage is extremely small in amount.

Two special evil consequences are foretold as likely to result.

One—Hardship on defendants, who may be overwhelmed by an infinity of suits.

The other—Incumbering the courts—clogging the dockets with a large number of "trivial" suits, thus hindering the progress of more important litigation.

As to hardship on defendants.

For reasons soon to be stated, we think that there will not be an enormous number of suits. But if there were, what special claim have the defendants to pity. *Ex hypothesi,* their acts were tortious.[14] If a rule of public policy, denying remedy, "shall become necessary, it certainly should be applied only when found necessary for the protection of the public and of the courts, and should not be given to a wrongdoer to defend himself from the natural consequences of his wrong."[15]

As to the danger of incumbering the courts, clogging the dockets, with a large number of "trivial suits,"[16] where the amount of actual damage is very small; thus hindering the progress of more important litigation:

It has been said that this objection proceeds upon the presumption "that a violation of the public right to the use of highways or navigable waters by unlawful obstructions therein will cause actual loss to so great a number of citizens that it is for the interest of the public that such citizens should suffer without legal redress, rather than that the courts should be incumbered with such amount of litigation as would result from private actions for actual special damages."[17]

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[13]See Burghen *v.* Erie R. R. (N. Y. 1908) 123 App. Div. 204.

[14]See Seymour D. Thompson, J., (1890) 41 Mo. App. 63, 82; Walworth, Chancellor, Lansing *v.* Smith (N. Y. 1829) 4 Wend. 9, 25.

[15]Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 365.

[16]See Allen, J., Davis *v.* County Commissioners (1891) 153 Mass. 218, 225.

[17]See Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 364, where Brown, J., says that the weight of authority does not justify such a "presumption".

We do not stop at this moment to consider whether the premise (the great number of cases of actual loss) is well founded, nor whether the conclusion (that remedy should therefore be denied in all cases of actual damage) is correct. It is enough for the present to call attention to the mistaken assumption that suits are likely to be brought in all cases of actual loss, however small the amount of loss. If it be granted that instances of actual loss of small amounts will be numerous, yet it does not follow that suits will be numerous. The danger of a multiplicity of suits is very much overestimated. The law as to costs, prevailing in most of our States, furnishes a very strong reason why such suits will not be frequent. The costs recoverable generally fall far short of making the plaintiff whole. They do not begin to equal the fees which he has to pay to his counsel. If he does not recover a substantial sum by way of damages, he is sure to be out of pocket by the litigation, although he has been the prevailing party.[18] It was probably in view of this pecuniary result to the plaintiff that Prof. Terry styled such actions "useless suits."[19] Where the damages recoverable are likely to be small, a prudent lawyer will generally refuse to sue in behalf of an impecunious client; and, if the applicant for his services is solvent, an honest lawyer will inform the applicant that he will lose money by suing, even though he should prevail. Under these circumstances, comparatively few suits are likely to be brought; except where there is a reasonable prospect of recovering substantial damages, or where a suit is brought to test the legality of an obstruction.

[18]The theory that the taxable costs afford a full compensation to the prevailing party is, in this country, a fiction; and courts have repeatedly repudiated it.

" . . . the costs, under our practice, awarded the prevailing party, are never sufficient to reimburse him for the actual cash expenses of the litigation, to say nothing of the loss of time and the inconvenience and trouble suffered." Morse, J., Brand *v.* Hinchman (1888) 68 Mich. 590, 597. " . . . we cannot, at this day, shut our eyes to the truth known by everybody, that taxable costs afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit." Church, J., Whipple *v.* Fuller (1836) 11 Conn. 582, 585. See also Sherwood, P. J., Smith *v.* Burrus (1891) 106 Mo. 94, 98; Corliss, C. J., Kolka *v.* Jones (1897) 6 N. Dak. 461, 467-468. In the above cited cases, the courts were specially considering the insufficiency of the taxable costs recoverable by a successful defendant. But the costs recoverable by a successful plaintiff are awarded on the same restricted scale, and are equally inadequate.

It is understood that in England costs are awarded on a more liberal basis. See Ross, J., Eastin *v.* Bank of Stockton (1884) 66 Cal. 123, 126; and 21 Am. L. Reg. [N. S.] 370.

[19]" . . . useless suits by persons who have suffered only nominal or very trifling damage." Terry, Principles of Anglo-American Law, § 527.

Thus far we have considered the objections to *permitting* the bringing of an action by a private individual who has been actually damaged.

But we must also consider the objections to *refusing* an action to such a person. The adoption of a rule making it a requisite that there should be particular kinds or classes of actual damage must not unfrequently result in denying remedy to a man who has sustained very substantial damage; which, however, does not fall within certain exceptional classes. And it must not unfrequently result in allowing a tort-feasor to escape civil liability, although his act has caused substantial loss. Do not these considerations outweigh the dangers to be reasonably apprehended from allowing suits for actual damage?[20]

It has been said, in argument,[21] that, "to avoid a multiplicity of suits, the law turns him to an indictment." But this would be a very unsatisfactory remedy to a damaged individual. In the criminal prosecution he would not, in the absence of special legislation, recover compensation.[22] If a fine is imposed, it goes into the public treasury. And if an order to the defendant to abate the obstruction is a part of the sentence, yet this gives no compensation for past damage. Nor would the individual sufferer be able to control the course of the prosecution, and determine when and how the charge should be tried; or, indeed, determine whether it should ever be tried at all. He would have no control over the District Attorney, who could *nol pros* the indictment or place it on file.[23]

We do not think that the apprehension of a multiplicity of

[20]"A rule that prohibits such actions may tend to discourage litigation but does not tend to promote justice." Rudkin, C. J., 56 Wash. 303, 309.

[21]Hughes *v.* Heiser (Pa. 1808) 1 Bin. 463, 465.

[22]See Walworth, Chancellor, in Lansing *v.* Smith (N. Y. 1829) 4 Wend. 9, 25.

[23]In Wheeler *v.* Bedford (1886) 54 Conn. 244, the owner of a house fronting on a town common, its situation upon which greatly enhanced its value, was allowed to maintain injunction proceedings against his neighbor, who sought to destroy the common by enclosing a large part of it for his own use. The court said that it constitutes no answer to the bill, that there are statutes authorizing public authorities to remove encroachments. Defendant argued that the plaintiff could have redress by application to those authorities. "But suppose", said Park, C. J., p. 249, "the authorities are unwilling to institute proceedings. Where then will be the ample remedy? They are not bound to redress the plaintiff's private grievances. They act solely for the public, 'induced by public considerations, when they act at all. 'Adequate remedy at law' means a remedy vested in the complainant, to which he may, at all times, resort, at his own option, fully and freely, without let or hindrance."

suits, or of evil consequences resulting therefrom, justifies the denial of remedy by private action whenever an individual has suffered actual damage in the sense of appreciable pecuniary loss, no matter how small in amount. Such an apprehension seems "hardly justified by the experience of the courts of jurisdictions where for many years" there has been no such denial of remedy.[24] So far as the requirement of damage is concerned, actual damage ought to be sufficient. There are, however, authorities entitled to respect who insist that something more should be required. They think that remedy should be permitted only for certain particular kinds of actual damage. The alleged additional requirements have been stated in various forms or phrases, all of which must be examined. But it is desirable to first ascertain the exact meaning of the requirement of "actual damage".

The distinction between actual damage and purely theoretical damage has already been stated. As a matter of legal theory, the law may be said to regard every member of the community as suffering damage whenever a public right is obstructed. But this theoretical damage is not equivalent to actual damage involving pecuniary loss to an individual. "The law cannot adopt a presumption so opposed to experience as a presumption that actual pecuniary loss to every citizen follows a violation of public right."[25] "In each of these cases, as in the present case," said Brown, J., "the plaintiffs were in the actual use of the way, and were subjected to actual obstruction, and to actual loss additional to that which, by presumption of law, attaches to each member of the public. This actual loss, proved as a matter of fact, is the gist of the private action."[26]

The term "actual damage", as here used, means "an amount assessed as the equivalent of an actually proved loss, however small." Courts have sometimes "confused small but real actual damages with nominal damages." But the two conceptions are entirely distinct. "Nominal damages" really "mean no damages at all". "The term 'nominal damages' is a technical one which negatives any real damage, and means nothing more than that a legal right has been infringed in respect to which a man is

[24]See Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 365.

[25]Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 364.

[26]Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 363.

entitled to judgment."[27] "Damages are not necessarily nominal because they are small in amount." "Small damages awarded as compensation for an actually proved but slight loss are not nominal damages," though the amount assessed "may be trifling."[28] When, therefore, it is said that a plaintiff cannot recover where the damage is merely nominal, the meaning is, not that he cannot recover where there is actual damage to a very small amount, but that he cannot recover if there is no actual damage at all.

The weight of authority is very strong that a plaintiff, in this class of actions, cannot recover if the damage is merely nominal; *i. e.*, cannot recover in the absence of actual damage.[29]

In the rare instances where a recovery has been allowed although a judge has spoken of the damage as "nominal", the decision must be regarded as erroneous; unless the court can be understood as using the expression "nominal" in the improper sense of "actual damage to a very small amount."[30]

As to the meaning and correctness of the expressions, "special", "particular", or "peculiar damage".

One, or more, of these expressions are frequently used by judges and text-writers, where we should prefer to speak of "actual damage"; and they are sometimes used as if each constituted an additional requirement to "actual". "Special", which

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[27]In such a case the insertion in the record of a trifling sum as "damage" is a mere formal matter. See McKean *v.* Cutler (1869) 48 N. H. 370.

[28]See 1 Sedgwick, Damages (9th ed.) 164, 165, and note 5 on p. 165; Lord Halsbury, in Owners of the Mediana *v.* Owners of the Comet (1900) 82 L. T. Rep. [N. S.] 95, 96; s. c. [1900] A. C. 113, 116. See Mr. Bower's suggestion that it would be correct to use the term "damage" without the prefix "actual". Bower's Code of the Law of Actionable Defamation, 33, note p.

[29]McDonald *v.* English (1877) 85 Ill. 232, 234-246; Carpenter *v.* Mann (1863) 17 Wis. 155; Gordon *v.* Baxter (1876) 74 N. C. 470. "This distinction would be utterly confounded if a citizen who has sustained no particular damage was allowed to make himself the avenger of an injury to the public"—even if he purports to sue in behalf of himself and all other citizens of the State.

[30]It was probably used in this sense by the Trial Judge in Brown *v.* Watson (1859) 47 Me. 161, where the evidence showed actual damage; and the opinion of the higher court seems to have assumed its existence. The defendant could not complain if the plaintiff was willing to accept a smaller sum by way of damages than the amount to which he was entitled. In Esson *v.* M'Master (1842) 1 Kerr, New Brunswick, 501, the jury were told that no special damages had been proved; and that, if they found for the plaintiff, the damages would be merely nominal. After a verdict for the plaintiff, a rule for a new trial was discharged. But the verdict was for a substantial amount, *viz.*, forty-five shillings.

is the more common of the three,[31] seems the most objectionable on account of its ambiguity. It is used in reference to several distinct subject-matters, and has different meanings when used in different contexts. An eminent judge once said that its use, in a certain connection, tends "to encourage confusion in thought".[32]

These three expressions can each be understood in an unobjectionable sense. They may be taken to signify simply actual damage, as distinguished from merely theoretical or nominal damage. So they may be understood as denoting actual damage sustained by a particular person individually, as distinguished from a damage sustained by him in common with all members of the public.[33] Many persons may each suffer damage of the same description from one single obstruction, and "yet the damage be special to each of them".[34] "Though it is a sort of consequence likely to ensue in many individual cases, yet in every case it is a distinct and specific one."[35] "While the wrong must be special, as contradistinguished from a grievance common to the whole public, who have the right to use the highway, it may nevertheless be the common misfortune of a number or even a class of persons and give to each a right of redress. The amounts of the damage recoverable by them may vary according to the extent of the loss shown in each case, but every one of them may maintain his status in court by alleging and proving precisely the same sort of wrong caused by the same obstruction."[36]

[31]Sir Frederick Pollock prefers "particular", and Judge E. H. Bennett prefers "peculiar". See Pollock, Torts (6th ed.) 387, note 3; and 19 Am. L. Reg. [N. S.] 626-627.

[32]See Bowen, L. J., in Ratcliffe *v.* Evans (1892) 2 Q. B. 524, 529. Also Bower's Code of the Law of Actionable Defamation, 33, note p.

[33]Lord Westbury seems to use "special damage" as synonymous with "individual particular loss", as distinguished from "damage which is sustained in common by all the subjects of the realm". See Ricket *v.* Metropolitan Ry. (1867) L. R. 2 H. L. 175, 203.

[34]See Sweeney *v.* Seattle (1910) 57 Wash. 678, 680.

[35]Pollock, Torts (6th ed.) 388.

[36]Avery, J., in Farmers' etc. Mfg. Co. *v.* Albermarle & Raleigh Ry. (1895) 117 N. C. 579, 586-587. And see Selden, J., in Milhan *v.* Sharp (1863) 27 N. Y. 611, 625-626.

In this connection attention may be called to Sir Frederick Pollock's statement (Torts (6th ed.) 387)—"A private action can be maintained in respect of a public nuisance by a person who suffers thereby some particular loss or damage beyond what is suffered by him in common with all other persons affected by the nuisance." Taking into account the context and illustrations, and also the "explanation" and illustrations of the learned author's draft of the Indian Civil Wrongs Bill, Pollock, Torts (6th ed.) 612, 613, we think that the author does not mean to require anything more than actual damage, which is a "distinct and specific" damage to the individual plaintiff. On page 388, he rejects the

But all these expressions ("special", "particular", or "peculiar damage") are objectionable, as giving some color to the erroneous idea that the damage must be exclusive; *i. e.,* that the plaintiff must be the only one to suffer damage of that description from the same cause. It is true, as we have just seen, that the damage of each must, in one sense, be peculiar to himself; but he need not be the only person who suffers that kind of damage from one and the same obstruction. Judges, however, sometimes seem influenced (unconsciously as it were) by the notion that if any person other than the plaintiff suffer the same kind of damage as the plaintiff, then there can be no recovery. The better view is that expressed by Brown, J.: ". . . although the defendant may be able to show that he has violated the theoretical right of every citizen, and that he has also inflicted upon several other citizens substantial damage and actual loss similar to that alleged by the libelants, such defense is without merit."[37]

The requirement that there must be, *at least,* actual damage, is not a merely formal matter; but is strictly enforced by courts, both so far as concerns allegations in pleadings or in special findings, and in regard to the method and sufficiency of proof by evidence.

"Interference with a common right is not of itself a cause of action for the individual citizen. Particular damage consequent on the interference is."[38] The burden is on the plaintiff to allege and prove actual damage to himself, "consequent upon his exercise of a public right being interfered with, and distinct from the fact that it is interfered with."[39]

It is not enough to allege that the defendant obstructed a

view that the damage must be exclusive, *i. e.* he thinks it no objection that the same kind of damage suffered by plaintiff is suffered in many other individual cases. And it seems unreasonable to suppose that he means that the actual damage suffered by the plaintiff individually must (in order to sustain an action) be greater in amount than the actual damage suffered by any other person individually. It would seem rather that his language was intended to require actual damage as distinguished from theoretical damage; the meaning being similar to that of Brown, J., when he says (89 Fed. 365),—It is the better view "that one who suffers actual pecuniary loss or damage, to that extent suffers beyond his portion of injury in common with the public at large, and may have his private action."

[37]Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 365.

[38]Pollock, Torts (6th ed) 387.

[39]Pollock, Torts (6th ed.) 612: Explanation of Article 53 in Draft of Indian Civil Wrongs Bill.

public highway, without also alleging that the obstruction caused damage to the plaintiff.[40] It is not sufficient to allege that a road was wrongfully obstructed, so that the plaintiff was deprived of its use. This is not construed as an averment of special damage to plaintiff, but as an averment of the same deprivation to himself as existed in the public.[41] It is not enough to allege, in general terms, that the plaintiff was "damaged" or "specially damaged", or "suffered special injury", or was "peculiarly and particularly injured", by the obstruction. That is a mere conclusion of law. Plaintiff must make specific allegations as to what the damage consisted in, and how it was brought about.[42]

It is not enough to allege that the obstruction occasioned delay, inconvenience, or hindrance to plaintiff. It must further be alleged, in substance, that such delay, etc., caused actual damage to plaintiff, which involved pecuniary loss. Nothing must be left to implication.[43]

An allegation that, by reason of the obstruction, plaintiff was delayed or inconvenienced is not sufficient. There must be a further allegation that pecuniary damage to him resulted from the delay or inconvenience. So an allegation that, by reason of the obstruction, plaintiff was obliged to take a circuitous route, is insufficient. There must be a distinct allegation that pecuniary loss was thereby occasioned.[44]

Hurt done to plaintiff's religious sensibilities will not give an action. A, B, and others, being Mussulmans, are accustomed to carry *tabuts* in procession along a certain public road for immersion in the sea. Q unlawfully obstructs the road so that the *tabuts* cannot be carried along it in the accustomed manner. A and B have no right of action against Q.[45]

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[40]See Lowery *v.* Petree (Tenn. 1881) 8 Lea, 674, 678.

[41]Storm *v.* Barger (1892) 43 Ill. App. 173, 174.

[42]Sohn *v.* Cambern (1885) 106 Ind. 302, 304; Van Buskirk *v.* Bond (1908) 52 Ore. 234, 237. In Stone *v.* Wakeman, Noy 120, judgment was arrested, "Because he hath not shewn how he hath suffered any particular damage or losse by that stopper."

[43]The plaintiff avers that, in attempting to travel upon the way, he was hindered, etc., from passing along the way: "Be it so; no averment shows any specific damage from this hindrance; it does not appear that upon any special occasion he was thereby compelled to make a longer detour to reach a particular place where he had need to go, nor that he lost any time or was put to any expense thereby." Demurrer to declaration sustained. Holmes *v.* Corthell (1888) 80 Me. 31, 33.

[44]See McCowan *v.* Whitesides (1869) 31 Ind. 235.

[45]Satku *v.* Ibrahim (1878) Indian Law Rep., 2 Bombay, 457; Westropp, C. J., 468, 469. Cited in Pollock, Torts (6th ed.) 613.

Plaintiff, in proving his case, does not, as in defamation, receive aid from any presumption. His burden is not lightened by any artificial rule of law. It is not enough to prove the bare fact that he was hindered or delayed by the obstruction. He must prove the further fact that he suffered actual pecuniary loss by reason of such hindrance or delay. There is no presumption that actual pecuniary loss follows a violation of public right. "Actual loss, proved as a matter of fact, is the gist of the private action."[46]

Having thus endeavored to ascertain the exact scope of the requirement that there must be at least actual damage, we are now in a position to consider whether the law should require something more than actual damage; whether the law should insist upon certain particular kinds of actual damage. Those who affirm that actual damage is not, *per se,* sufficient ground for a private suit against a wrongful obstructer of a public way, differ somewhat as to the form of stating the alleged additional requirements. The most frequent form of statement (expressing it roughly and in general terms) is, that the damage to the plaintiff must differ in kind, and not merely in degree, from that sustained by the general public. But before giving extended consideration to this statement, it may be desirable to briefly discuss some other forms of statement.

It is sometimes said that there can be no recovery if the damage is "consequential".

The term "consequential damage" is an equivocal one. On the one hand, it is used to denote a damage which is so remote a consequence of an act that the law affords no remedy to recover for it. On the other hand, it is used to denote damage which, though actionable, does not follow immediately, in point of time, upon the doing of the act complained of. In the present discussion, it is used in the latter sense. We are now assuming the existence of actual damage; and are considering whether the law should insist upon certain particular kinds of actual damage. To require that the damage, though actual, must not be consequential, is to allow a defendant to escape because the damage, though distinctly traceable to the defendant's tort, did not follow

[46]See Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 363, 364.

immediately upon the commission of the tort. This ground is untenable.[47] The phrase "consequential damage" has never served any useful purpose except in marking a distinction between damage which was recoverable at common law in an action of case, and that which was recoverable in an action of trespass. When applied to questions of causation, it only produces confusion.[48] It should not be made a test of the right to bring a private action for the obstruction of a public way. As to this there is a conflict of authority, but the question seems very clear on principle.[49]

It is sometimes said, in substance, that the bare requirement of actual damage is not sufficient; but that the actual damage must be considerable in amount. (See 1 Street, Foundations of Legal Liability, 228.) It is virtually asserted that the law should require something more in degree or extent than actual damage of the smallest amount. But how much more? Here is the difficulty. There is no satisfactory way of fixing the *quantum*. The proposed rule is unworkable.[50]

As to one subject matter, the action of waste, the English

[47]See the fuller discussion in 51 N. H. 519-521.

[48]See 25 Harvard Law Rev. 250-251.

[49]In favor of the view that there can be no recovery if the damage is "consequential": see Holt, C. J., Pain *v.* Patrick, Carth. 191, 194; Dunn *v.* Stone (1815) 4 N. Car. 261, 2 Car Law Repository, 261; Carey *v.* Brooks (S. C. 1833) 1 Hill Law, 365, 368; Steamboat Co. *v.* Railroad Co. (1888) 30 S. C. 539, 545, 548; Christian's note, 3 Bl. 220; and see Horton, C. J., 35 Kan. 611, 614.

In favor of the opposite view, that actual damage, though "consequential", is recoverable: see 3 Sedgwick, Damages (9th ed.) § 946; Judge Bennett in 19 Am. L. Reg. [N. S.] 637; 1 Bishop, New Crim. Law, § 265, par. 3; 1 Street, Foundations of Legal Liability, 226, 227; Tilghman, C. J., in Hughes *v.* Heiser (Pa. 1808) 1 Bin. 463, 469; Sharswood, J., in Penn. & Ohio Canal Co. *v.* Graham (1869) 63 Pa. 290, 296; 2 Wood Nuisances (3rd. Ed.) § 645, note 1.

[50]"If a direct particular damage be sustained, it seems that the exility of the injury is no objection to the action." Mr. Fraser, Editorial Note to Williams' Case, 5 Coke 73a (Eng. ed. of 1826).

"The right to maintain the action does not depend on the amount of the special damage provided the plaintiff suffered some material injury peculiar to himself." Vann, J., Flynn *v.* Taylor (1891) 127 N. Y. 596, 600.

"The extent of this peculiar injury is not of the slightest consequence so far as the right of action is concerned." Barnard, P. J., Crooke *v.* Anderson (N. Y. 1880) 23 Hun 266, 268.

"How small a damage actually incurred will support a private action is well illustrated by the case of Pierce *v.* Dart (N. Y. 1827) 7 Cow. 609." Plaintiff was obliged, on four occasions, to stop and pull down a fence across a highway. The loss to plaintiff did not exceed twenty-five cents for the whole four times.

Judge E. H. Bennett, 19 Am. L. Reg. [N. S.] 628.

courts long ago adopted an arbitrary limit; holding that the action could not be maintained if the damage assessed fell below three shillings and four pence.[51] But modern courts are not likely to fix such a limit in the case now in hand; and in the United States there might be constitutional difficulties in the way.

In some early reports as to private actions for obstruction of public ways, it was suggested that there must be "grand damage". But such a test presents the same practical difficulty as the word "considerable" suggested above.

We come now to the consideration of the most common form of statement; the alleged rule,—That, in order to maintain a civil suit for damage caused by an obstruction to travel upon a public way, the plaintiff's damage must be different in kind, and not merely in degree, from that sustained by the general public.

Other expressions are used which are synonymous with "the general public"; such as, "the public at large"; "the whole public"; "the entire community"; "the community at large". These expressions might not unnaturally be understood as equivalent to "all the citizens of the State who have a right to use the public way".[52]

As to the alleged general rule, there is a serious conflict of authority: first, as to whether it should be adopted; second, as

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[51] 3 Sedgwick, Damages (9th ed.) § 950; Bewes, Waste, 125-129.

[52] Sometimes, instead of using a broad term, such as "the general public", courts have substituted various expressions equivalent in effect to "that part of the public having occasion to use the obstructed way". And courts, although using the broader expression, sometimes apply the rule as though the narrower term had been employed.

It has generally been assumed that no individual can have a private action in a case where the entire public have suffered the same damage as the plaintiff. See Gregory, J., 31 Ind. 235, 237. This is true, where the damage "suffered" by everybody (plaintiff included) is mere theoretical damage. But suppose that a court adopts the above limited description of "the public", and then suppose that every individual member of this limited public suffers actual damage from the obstruction. Should each individual member of the public be denied compensation for his actual loss, because all the other individual members have also suffered actual loss? Of course, such a case would rarely occur; but its happening is conceivable.

"I do not think it is sound to say . . . . that an injury which is shared by the public cannot support a claim for compensation. It is more sound to say that if the injury be specific and proved it is of no moment how many other premises are also injured." Lord Justice Clerk (Lord Moncreiff), in Walker's Trustees *v.* Caledonian R. R. (1881) 8 Sc. Sess. Cas. (4th Series) 405, 420.

to what interpretation and application should be given to it, in case of its adoption.

Many State courts profess to adopt the rule.[53]

On the other hand, the alleged rule is squarely rejected by the great weight of authority in the Federal courts.

The Federal authorities on this point are summarized as follows by Wellborn, J., in *Carver* v. *San Pedro, etc., R. R.* (C. C. 1906) 151 Fed. 334, 335:

"It is firmly established by a long line of federal decisions that an obstruction to navigable water may be enjoined by a private person who is injured thereby differently from the general public, either in degree or kind. *Georgetown* v. *Alexander Co.*, 12 Pet. 98, 9 L. Ed. 1012; *Pennsylvania* v. *Wheeling, etc., Bridge Co.*, 13 How. 564, 14 L. Ed. 249; *Union Pacific Railroad Co.* v. *Hall*, 91 U. S. 343, 355, 23 L. Ed. 428; *Baird* v. *Shore Line Ry. Co.*, 2 Fed. Cas. 427 (No. 758); *Works* v. *Junction R. R.*, 30 Fed. Cas. 626 (No. 18,046); *Hatch* v. *Wallamet Iron Bridge Co.* (C. C.) 6 Fed. 326; *Id.* (C. C.) 6 Fed. 780. This last case was reversed by the Supreme Court, but the reversal was on jurisdictional grounds, not affecting the point now under consideration. *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 2, 8 Sup. Ct. 811, 31 L. Ed. 629."

After commenting upon *Whitehead* v. *Jessup* (C. C. 1893) 53 Fed. 707, which is contrary to the great weight of Federal authority, the learned Judge continues:

"'The just rule, it seems to me, is that relief should be granted in all cases where there is special injury to the complainant whether the injury complained of be different in kind from that of the public at large or only greater in degree, and this unquestionably is the doctrine of *Pennsylvania* v. *Wheeling Bridge Co., supra,* as the Supreme Court itself subsequently declared in the following unmistakable terms:[54]

" 'An application for a mandamus, not here a prerogative writ, has been supposed to have some analogy to a bill in equity for the restraint of a public nuisance. Yet, even in the supposed analogous case, a bill may be sustained to enjoin the obstruction of a public highway, when the injury complained of is common to the public at large, and only greater in degree to the complainants. It was in the Wheeling Bridge Case, 13 How. 518, 14 L. Ed. 249,

[53]See numerous cases cited in 37 Cyc. of Law and Practice, 250, n. 5; and in 21 Am. & Eng. Encyc. of Law (2nd ed.) 714, n. 1 and 3. To these authorities many more might be added.

[54]Union Pacific R. R. *v.* Hall (1875) 91 U. S. 343, 355.

where the wrong complained of was a public wrong, and obstruction to all navigation of the Ohio river.' "[55]

For other federal authorities, see *Piscataqua Nav. Co.* v. *New York, N. H. & H. R. R.* (D. C. 1898) 89 Fed. 362; s. c. (C. C. A. 1901) 108 Fed. 92; *Works* v. *Junction R. R.* (1853) 5 McLean 425; *Chatfield Co.* v. *New Haven* (C. C. 1901) 110 Fed. 788.

The alleged general rule is also distinctly rejected by various jurists.[56]

Furthermore, the alleged general rule is not recognized by various State courts, which render important decisions in favor of plaintiffs without professing to base them upon this rule. These courts, instead of professing to interpret and apply the alleged rule, virtually ignore it.

Among the courts which profess to adopt the alleged rule, there is a remarkable conflict of authority as to its interpretation and application. The existence of this conflict constitutes, in itself, a strong argument against the adoption of the rule. Another argument is found in the practical injustice resulting from the rule as interpreted and applied by some courts.

Speaking generally: one class of authorities construe the rule

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[55]Pennsylvania *v.* Wheeling, etc., Bridge Co. (U. S. 1851-1852) 13 How. 518, was not a criminal prosecution. The State was not suing in its sovereign capacity; but as a property owner by virtue of its proprietorship of certain canals which gave it a revenue interest in the navigation of the public river which the bridge obstructed. See McLean, J., at pp. 559, 561; also 176 U. S. 1, 19; and 108 Fed. 92, 94.

[56]"It is well, therefore, to look back to the older cases in which this exception was first established to ascertain the exact terms in which it is expressed.

"In *Iveson* v. *Moore* [1 Ld. Raym. 486] the language of the Judges in the Exchequer Chamber affirming the exception and establishing the right of action was, that 'the Plaintiff did necessarily suffer an especial damage *more than* the rest of the King's subjects.' In *Ashby* v. *White* [Smith's L. C. (4th ed.) vol. 1, 185, 212] the language was 'still if any person have sustained a particular damage *beyond* that of his fellow-citizens,' &c. The Judges do not say a damage of a *different kind or description* from that suffered by other subjects, but 'more than' or 'beyond' their fellow-citizens. The question then, is, whether when a highway is obstructed, the owners of those lands which are situated in a sufficient degree of proximity to it to be depreciated in value by the loss of that access along the highway which they previously enjoyed, suffer special damage 'more than' and 'beyond' the rest of the public. It surely cannot be doubted but that they do." Lord Penzance, Metropolitan Board of Works *v.* McCarthy (1874) L. R. 7 H. L. 243, 263.

See Seymour D. Thompson, J., in Charles H. Heer Dry Goods Co. *v.* Citizens Ry. (1890) 41 Mo. App. 63, 77; Bowden, J., in Gleason *v.* Schneider (1886) 7 Ky. L. Rep. 834.

in such a way as to excessively restrict private suits; while another class of authorities adopt a construction which leads, in a large proportion of cases, to the same practical result that would have been reached by applying the simple test of actual damage.

Taking the expression "the general public" in its broadest signification, it seems to us that the alleged rule might be understood to mean only that the plaintiff must prove actual damage to himself, as distinguished from the theoretical damage which, in contemplation of law, is supposed to be sustained by the entire community. Actual damage certainly differs in kind from mere theoretical damage. The statement, thus interpreted, would amount to this,—A defendant cannot escape liability for causing actual damage to an individual, on the ground that he has also, by the same obstruction, caused theoretical damage to all citizens of the State. This, instead of stating an additional requirement, would be merely a clumsy and roundabout way of repeating (restating) the actual damage test. But the foregoing view of the effect of the alleged general rule differs widely from that entertained by some courts.

Under the construction given to the alleged general rule by some courts, the maintenance of private actions is extremely restricted; and compensation is frequently denied to plaintiffs who have suffered very substantial damage. Courts which are inclined to narrowly restrict the private remedy are apt to construe the expression "the general public" as if it read "any other single member of the general public". And some of these courts construe the word "sustained" as meaning, either "actually sustained", or "liable to be sustained" ("which might have been sustained").

Acting upon these interpretations of the alleged rule, some courts virtually hold:—

Proposition One: That a plaintiff, although he has sustained actual damage, cannot maintain a civil action, if damage similar in kind or character to his had been actually sustained by any other single member of the public.[57]

[57]As examples of this doctrine, see the following:
In *Davis* v. *County Commissioners* (1891) 153 Mass. 218, 222, 224-225, the trial judge found that the petitioners' real estate "will be seriously and permanently injured by the carrying out of the order." The court, nevertheless, said that the petitioners would not be entitled to recover damages for the diminished value of their lands, "that being a loss not peculiar to themselves, but the same in kind as that which is suffered by others who owned lands situated upon the same street, or other streets contiguous thereto."

And some courts, going further, also hold:—

Proposition Two: That even though damage similar in kind or character to the plaintiff's has not, in fact, been sustained by any other member of the public, yet the plaintiff's action is barred if similar damage was liable to be sustained by any other member of the public. Or, in other words, plaintiff has no action, if damage of a similar character might have been incurred by any other member of the public, if he had attempted to use the way under the same circumstances that existed at the time of plaintiff's attempt.[58]

The first of the above propositions practically requires that the plaintiff's damage must be exclusive; *i. e.,* plaintiff cannot recover if any one else does in fact suffer damage of a similar character from the same obstruction.

The second proposition is practically prohibitive of a private

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In *Lansing* v. *Smith* (N. Y. 1828) 8 Cow. 146, 157-159, Sutherland, J., said:

"... that the special injury, ... must be peculiar to the plaintiff, and not common to him and many others; that if it operates equally, or in the same manner upon many individuals constituting a particular class, though a very small portion of the community, it is not a *special damage to each* within the meaning of the rule." It is not enough that plaintiff "should suffer more than the community generally, if he only suffer in common with a distinct class." But see the same case in error, 4 Wend. 9, 28.

[58]As examples of this doctrine, see the following:

Blackwell v. *Old Colony R. R.* (1877) 122 Mass. 1. Declaration alleged that a navigable river (an arm of the sea) was obstructed by the building of a bridge, whereby plaintiff, the owner of a parcel of land and a wharf above the bridge, was prevented from coming to the wharf from the sea in vessels as heretofore; that plaintiff's wharf was the only one above the bridge used for business purposes; and that plaintiff was compelled by the obstruction to abandon the use of his wharf for such purposes and to transport his goods over the defendant's railroad at an enhanced cost of $1000 a year. A demurrer to the declaration was sustained.

Gray, C. J., p. 3: "The fact that the plaintiff alone now navigates the stream, or has a wharf thereon at which he carries on business, only shows that the present consequential damage to him may be greater in degree than to others, but does not show that the injury is different in kind, or that other riparian proprietors and the rest of the public may not, whenever they use the stream, suffer in the same way."

Thomas *v.* Wade (1904) 48 Fla. 311. Plaintiff's steamboat was apparently the only vessel on a river large enough to be unable to get through the draw in a bridge, built after plaintiff had begun running the steamboat. Decision for defendant, by three judges against two.

Whitfield, J., p. 314: "There is no showing of injury or damage to complainant different in kind from that of any other person who might undertake to use the stream for purposes of navigation under similar circumstances."

Compare South Carolina Steamboat Co. *v.* South Carolina R. R. (1888) 30 S. C. 539, 542-543, 548.

action under almost all situations. "If", said Beatty, J.,[59] "what others might suffer under the same circumstances were made the rule, then in no case could it be said individuals ever suffer special damages from a public nuisance."[60]

Propositions One and Two are, one or both, denied by various courts which profess to adopt the alleged general rule. And they are also, as might have been expected, denied by other courts which have, either expressly or practically, repudiated the alleged general rule.[61]

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[59]Spokane Mill Co. *v.* Post (C. C. 1892) 50 Fed. 429, 432; approved in Morris *v.* Graham (1897) 16 Wash. 343, 345.

[60]As to possible exceptions, where actions might be maintained, even supposing the second proposition to be established law:—

In Silver Creek, etc., Co. *v.* Yazoo, etc., R. R. (1907) 90 Miss. 345, a bill was sustained in a case where plaintiff, an Improvement Company, had been granted, by the legislature, an exclusive right, for a term of years, to navigate a stream.

See also Chicago *v.* Webb (1902) 102 Ill. App. 232; and Bembe *v.* County Commissioners (1902) 94 Md. 321. But compare Atwood *v.* Partree (1888) 56 Conn. 80.

[61]As examples of such denial, see the following:—

"While the wrong must be special, as contradistinguished from a grievance common to the whole public, who have the right to use the highway, it may nevertheless be the common misfortune of a number or even a class of persons and give to each a right of redress. The amounts of damage recoverable by them may vary according to the extent of the loss shown in each case, but every one of them may maintain his status in court by alleging and proving precisely the same sort of wrong caused by the same obstruction."

Avery, J., Farmers, etc., Mfg. Co. *v.* Albemarle & Raleigh R. R. (1895) 117 N. C. 579, 586-587.

"While a property holder in order to recover damages for the obstruction or vacation of a public highway must suffer a special damage therefrom different in kind from that suffered by the general public, it is not the rule that he must suffer a damage peculiar to himself alone. Many persons may suffer a damage for one such single act, yet the damage be special to each of them."

Fullerton, J., Sweeney *v.* City of Seattle (1910) 57 Wash. 678, 680.

"But every individual who suffers actual damage from a common nuisance may maintain an action for his own particular injury, though there may be others equally damnified."

3 Sedgwick, Damages (9th ed.) § 946.

"It is not sufficient to defeat the right, however, that a large number of persons suffered special damage. If so, it would only be necessary for the company, when an injury has been inflicted upon one for which damage should be awarded, to inflict a like injury on many others in order to escape liability."

Cockrill, C. J., Hot Springs R. R. *v.* Williamson (1885) 45 Ark. 429, 441.

"I am of the opinion that . . . although the defendant may be able to show that he has violated the theoretical right of every citizen, and that he has also inflicted upon several other citizens substantial damage and actual loss similar to that alleged by the libelants, such defence is without merit."

Brown, J., Piscataqua Nav. Co. *v.* New York, N. H. & H. R. R. (D. C. 1898) 89 Fed. 362, 365.

To our mind, rejection of Propositions One and Two is justified. But by what method shall the law arrive at this result? By squarely rejecting the alleged general rule, and deciding each case by applying the single and simple test of actual damage? Or, by professing to adopt the alleged general rule, and then interpreting it in such a way as to preclude the affirmance of Propositions One and Two? We think the former method preferable. Under the latter method, the interpretation given to the rule by the courts brings about correct results. But these results might equally well have been obtained by discarding the alleged rule, and applying instead the simple test of actual damage. These courts, in theory, annex an additional requirement to the test of actual damage; and then construe the additional requirement in such a way that it does not affect the practical result, which is the same that would have been reached without it. If the court decides in favor of a plaintiff upon the ground that his damage

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If a plaintiff's damage "is of like kind with that of the general public, though greater, he cannot recover. But it must be borne in mind that the fact that others may be in the same situation with plaintiff as regards the effect upon the use of their property, yet that will not bring her within the rule preventing her recovery. There may be others in the same block as effectually cut off by the embankment as is the plaintiff; still she may recover. Others being in like situation with her and suffering the same kind of damage does not constitute the general community in the sense of the rule just stated."

Ellison, J., Ellis *v.* St. Louis, etc., R. R. (1908) 131 Mo. App. 395, 399.

"The fact that said obstruction injured others in like manner and degree as appellees is immaterial so long as the injury was peculiar to them, and did not embrace the public in general." Monks, J., Martin *v.* Marks (1900) 154 Ind. 549, 560.

" . . . the injury must be special and peculiar. It may be to more than one, but must not embrace the entire public." Gregory, J., McCowan *v.* Whitesides (1869) 31 Ind. 235, 237.

Injunction will be granted to prevent unlawful vacation of street, if the property of plaintiff, an abutting owner, "would thereby be depreciated in value, notwithstanding that it would affect many other landowners in the vicinity in the same manner." Texarkana *v.* Leach (1898) 66 Ark. 40.

In Spokane Mill Co. *v.* Post (C. C. 1892) 50 Fed. 429, the complaint alleges that, by obstructions placed in the river by defendant, the plaintiff is prevented from floating down the stream a lot of logs it now has just above such obstructions. Beatty, J., p. 432: "This was a special damage suffered in this particular instance, in which other members of the community did not share. It is true others would have suffered in the same way, perhaps to a different degree, had they attempted to run logs down the river; but if what others might suffer under the same circumstances were made the rule, then in no case could it be said individuals ever suffer special damages from a public nuisance." (Quoted with approval in Morris *v.* Graham (1897) 16 Wash. 343, 345.)

So in Page *v.* Mille Lacs Lumber Co. (1893) 53 Minn. 492, an action for obstruction to plaintiff's log-driving, the court would not deny recovery, because other persons might have been injured and damaged in the same manner and to the same extent, had they met the obstruction under like circumstances. Pages 499-500.

"differs in kind" from certain other classes of actual damage, we think that the decision turns upon an irrelevant issue. The crucial issue should be, whether the plaintiff has suffered actual damage of any kind or description which involves appreciable pecuniary loss.

The law is not obliged to choose between adopting the alleged general rule or having no rule at all to prevent "an intolerable multiplicity of suits". The alleged rule is in the nature of a supplement to, or qualification of, another rule, the existence of which is universally admitted; *viz.*, the requirement of actual damage. The alleged rule proceeds upon the assumption that there must always be actual damage. Its special, or additional, feature, consists in the assertion that actual damage, to justify recovery, must be actual damage of a certain kind, class or description. Obviously the rejection of the alleged rule does not involve the rejection of the rule requiring actual damage.

An illustration of the effect of adopting the above Propositions One and Two is afforded in cases where an obstruction has caused delay to a plaintiff, or has compelled him to take a circuitous route.

To the question whether delay, or compulsion to take a circuitous route, can give rise to (or constitute an element in maintaining) a private action, various answers have been made. The substance of three differing answers is here given:—

Answer 1. No; neither *per se,* nor as material elements to be considered in connection with other facts. No action lies, even though the delay or compulsion has resulted in actual damage to the plaintiff.[62]

Answer 2. The mere fact that plaintiff is delayed, or is compelled to take a circuitous route, will not support an action.

Literally, this is correct; but it is liable to misapprehension. On a superficial reading it might be taken to mean that delay, or compulsion to take a circuitous route, cannot constitute a material element in making out plaintiff's case, even when considered in connection with other facts (as to which see Answer 3).

Answer 3. While neither delay, nor compulsion to take a

[62]See, for example, Houck *v.* Wachter (1871) 34 Md. 265; Farrelly *v.* Cincinnati (Ohio, 1859) 2 Disn. 516.

It is generally true that damage of a character similar to plaintiff's either has been, or might have been, incurred by some other person. Hence courts which adopt Propositions 1 and 2 generally hold that no action is maintainable. For a representative case, see Nichols *v.* Richmond (1894) 162 Mass. 170, 173.

circuitous route, is sufficient *per se* to support an action, yet, if such delay or compulsion caused pecuniary loss to plaintiff, then an action lies. There is, however, no presumption that pecuniary loss resulted. Such loss must be properly alleged and actually proved.

This answer is, we think, substantially correct.[63]

But the limitations stated in Answer 3 must be carefully noted. The fact that one travelling on the highway is prevented by an obstacle from pursuing the most direct route will not necessarily and invariably cause pecuniary damage to him. If he is travelling for health or pleasure, a circuitous route may serve his purpose just as well as the more direct; and, even though absolutely prevented from completing his journey he may not thereby suffer any pecuniary loss. Or, if he is travelling upon a business undertaking, the circuitous route, though longer in actual distance, may be preferable, having a better road-bed and easier grades; being in fact the route generally used by business travellers.

(TO BE CONCLUDED.)

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[63] See the following authorities: Rose *v.* Miles (1815) 4 M. & S. 101; Greasly *v.* Codling (1824) 2 Bing. 263; Hart *v.* Basset (1672) T. Jones, 156; Chichester *v.* Lethbridge (1738) Willes, 71; Blagrave *v.* Bristol Water Works Co. (1856) 1 Hurl. & Norm. 369; Milarkey *v.* Foster (1877) 6 Ore. 378; Brown *v.* Watson (1859) 47 Me. 161. See also Pittsburgh *v.* Scott (1845) 1 Pa. St. 309, 319-320.

Plaintiff "sustained actual pecuniary loss because of being compelled to take a roundabout route in order to avoid the obstruction." Pitney, J., in Ryerson *v.* Morris, etc., Co. (1903) 69 N. J. L. 505-508.

The referee found that the obstruction compelled plaintiff to take a longer route, "to his pecuniary damage". Wakeman *v.* Wilbur (1895) 147 N. Y. 657.

(In the three following quotations, the italics are ours.)

"... mere personal inconvenience caused by the plaintiff being delayed by an obstruction in the highroad, *without pecuniary damage*, will not suffice." Clerk & Lindsell, Torts (2d ed.) 341.

"... mere delay caused by an obstruction, *unaccompanied by special injury*, does not, as a rule, give any right to an action for special damages." 2 Elliott, Roads and Streets (3rd ed.) § 854.

"The mere fact that a person is delayed or compelled to take a circuitous route by an obstruction in the highway, does not *necessarily* constitute special damage." Peabody, J., Smart *v.* Aroostook Lumber Co. (1907) 103 Me. 37, 50.

"And, first, as to an action for mere delay or deviation caused by the obstruction. Thus inconvenience merely does not sustain a private action ... Passing from the mere delay or inconvenience of taking a different route, it seems equally clear that if such delay does cause peculiar damage, either to the person or property of the plaintiff, this gives a right of action." Judge E. H. Bennett, 19 Am. L. Reg. [N. S.] 625-627.